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No. 85-125

In the Supreme Court of the United States

OCTOBER TERM, 1985

BOYD WALTON, JR., ET UX., ET AL., PETITIONERS

v.

COLVILLE CONFEDERATED TRIBES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held (i) that the evidence was insufficient to establish that petitioners' predecessors in interest, who purchased Indian allotments from the original allottees on the Colville Indian Reservation, had the requisite intent to irrigate 104 acres of land, and (ii) that petitioners therefore did not succeed to a reserved water right for the full amount of that acreage.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 752 F.2d 397, and the order denying rehearing (Pet. App. 58a-59a) is reported at 758 F.2d 1324. The prior opinion of the court of appeals (Pet. App. 36a-57a) is reported at 647 F.2d 42. The opinion of the district court (Pet. App. 16a-34a) is unreported. The prior opinion of the district court is reported at 460 F. Supp. 1320.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1985, and the petition for rehearing was denied on April 22, 1985 (Pet. App. 58a-59a). On July 19, 1985, Justice Rehnquist extended the

time within which to file a petition for a writ of certiorari to and including July 23, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns claims to water in a small watershed that lies wholly within the Colville Indian Reservation in the State of Washington. The watershed is drained by a small, non-navigable stream known as "No Name Creek." Arising from a spring on the Reservation, No Name Creek flows southward across the Reservation for approximately three miles and then empties into Omak Lake, a saline body of water that has no outlet and also lies entirely within the Reservation. Pet. App. 3a, 39a.

The Colville Reservation was established by Executive Order of July 2, 1872. 1 C. Kappler, *Indian Affairs, Laws and Treaties* 915-916 (2d ed. 1904). The Reservation originally included 2.8 million acres, but it was reduced to 1.3 million acres 20 years later when the northern half of the Reservation was restored to the public domain and opened to settlement. Act of July 1, 1892, ch. 140, § 1, 27 Stat. 62. In 1906, Congress ratified an agreement between a majority of the tribal members and the United States, which provided for the allotment of lands within the "diminished" reservation to individual Indians pursuant to the General Allotment Act of 1887 and for the settlement of surplus unallotted lands within the diminished Reservation. Act of Mar. 22, 1906, ch. 1126, § 2, 34 Stat. 80. Despite the alienation of some parcels to non-Indians, the whole of the "South Half" of the original area remains in reservation

status. See *Seymour* v. *Superintendent*, 368 U.S. 351 (1962). See Pet. App. 37a-38a.

Beginning in 1917, seven allotments were set aside in the No Name Creek watershed. Three of those allotments (Nos. 525, 2371 and 894) passed out of Indian ownership between 1921 and 1925. They were purchased in 1948 by petitioners, who are non-Indians. Three other of the seven allotments (No. 892 to the north of petitioners' property and Nos. 901 and 903 to the south) are held in trust by the United States for the benefit of the heirs of the original allottees and are farmed by the Colville Confederated Tribes under long-term leases. The seventh and northernmost allotment (No. 526), which is held by the United States in trust for the Tribes, was excluded from the instant water adjudication because water to irrigate it is potentially available from another source, so that water flow from the No Name Creek watershed would not be needed for that purpose. Pet. App. 2a-3a & n.1, 17a-19a, 24a-25a n.12, 38a-39a, 46a-47a.[1]

Apparently none of the land in the three former allotments now owned by petitioners was irrigated when they passed out of Indian ownership between 1921 and 1925. However, the first non-Indian purchasers (the Whams) brought about 30 acres under irrigation, utilizing water from No Name Creek, soon after they acquired the land.[2] The Whams and their

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[1] A map of the watershed, which was included as an appendix to the original opinion of the district court (460 F. Supp. 1320, 1336 (1978), is reproduced in the brief in opposition (at 3) filed by the Tribes.

[2] In addition, because of certain unique geological characteristics that maintained ground water at a high level, portions of allotments Nos. 2371 and 894 were sub-irrigated and

successors in interest continued to irrigate approximately the same amount of land for the next 23 to 27 years. When petitioner Walton acquired the three allotments in 1948, he immediately applied to the State for a permit to irrigate an additional 75 acres. The State granted a permit for 65 acres, " 'subject to existing rights' " (Pet. App. 38a). Using aluminum pipe and pumps installed following the bringing of electricity to the area, Walton irrigated approximately 104 acres in 1949 and 1950. Pet. App. 6a, 9a-11a, 18a-20a.

2. a. The Tribes filed this action against petitioners in 1970 in the United States District Court for the Eastern District of Washington. The Tribes alleged that they were the owners of the water in No Name Creek and that petitioners were appropriating the Creek's entire flow without their approval. The Tribes requested an injunction against this allegedly unauthorized appropriation. In their answer, petitioners contended that they were entitled to water from No Name Creek, both as successors in interest to the original allottees and by appropriation under state law. 460 F. Supp. 1320, 1324 (1978). The Tribes also asserted a right to water for maintaining the flow of No Name Creek for the spawning of the Lahontan cutthroat trout, an anadromous species introduced into Omak Lake in 1968 (*id.* at 1330). In 1973, the United States filed a separate action against petitioners and the State on its own behalf and on behalf of the Tribes and their members. The two actions were consolidated for trial.

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required no application of water from No Name Creek. Approximately 40 acres of such land were cultivated by the Whams. Pet. App. 18a & n.4.

b. The district court rendered its initial decision on October 25, 1978 (460 F. Supp. 1320). It held that when the Reservation was established, the United States reserved water to fulfill the purposes of the Reservation, including agriculture (*id.* at 1325-1326). The court further held that, upon the acquisition of an allotment by an individual Indian, the right to use a portion of the reserved water passed to the allottee and became appurtenant to his land, with a priority date of the creation of the Reservation, and that this right continued after the Indian acquired the allotted land in fee (*id.* at 1326). The district court concluded, however, that this reserved right could not be transferred to a non-Indian. In the court's view, upon the sale of his property to a non-Indian, an Indian allottee transferred a right only to such water as he had appropriated at the time of the conveyance, with a priority date of his first appropriation. Accordingly, the court held that petitioners succeeded to a right to irrigate only 32 acres, the amount of land under irrigation when they purchased the allotments, with a priority date of the appropriation of water to irrigate that acreage. *Id.* at 1326-1329.

The district court declined to recognize a reserved right to water for the spawning of the Lahontan cutthroat trout. Although it acknowledged that fish were a traditional food source for Washington Indians and that the natural source of fish on the Reservation was eliminated by the construction of dams on the Columbia River, the court deemed it unnecessary to recognize a reserved water right for the purpose of sustaining spawning grounds for the Lahontan trout so long as fish continued to be made available

to the Tribes from a federal hatchery. 460 F. Supp. at 1330.

In quantifying the water rights on the Reservation, the court found that, on average, 1,000 acre-feet of water are available each year. The court found that of this amount, 666.4 acre-feet are reserved to the members of the Tribes for potential irrigation of 166.6 acres on the three Indian-held allotments. 460 F. Supp. at 1330-1331.

3. On appeal, the court of appeals affirmed the district court's holding that when the Colville Reservation was established, the United States reserved the right to sufficient water to fulfill the purposes of the Reservation (Pet. App. 41a-47a). However, the court of appeals reversed the district court's determination that petitioners, as non-Indian fee owners of formerly allotted land, could not share in that reserved water right. Instead, following the earlier decisions in *United States ex rel. Ray* v. *Hibner*, 27 F.2d 909, 912 (D. Idaho 1928), and *United States* v. *Adair*, 478 F. Supp. 336, 348-349 (D. Ore. 1979), modified, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984), the court of appeals held that a non-Indian purchaser from an Indian allottee acquires a right, with a priority date of the establishment of the reservation, to the amount of water that was being appropriated by the allotte at the time title passed from Indian ownership plus any additional amount the non-Indian appropriated with "reasonable diligence" after acquiring title to the land (Pet. App. 47a-52a). The court of appeals also held that the Tribes have a right to use reserved water to maintain the Omak Lake fishery, including sufficient water to permit natural spawning of the trout (*id.* at 45a-46a). The court of appeals remanded the case to the district court to determine the

extent of the petitioners' right to share in the Indians' reserved water right and the scope of the Tribes' water right for the fishery (*id.* at 52a, 57a).[3]

4. On remand, the district court determined that the Whams brought approximately 30 acres under irrigation utilizing water from No Name Creek soon after acquiring the allotments between 1921 and 1925 (Pet. App. 17a-18a). The court further found that petitioner Walton had brought additional land under irrigation (for a total of 104 acres) soon after purchasing the three allotments in 1948 (*id.* at 20a-21a). The district court believed that under the court of appeals' mandate, only the diligence of petitioner Walton, not that of his non-Indian predecessors in interest, was relevant in determining the scope of petitioners' water right; on this premise, it held that Walton personally had exercised reasonable diligence in irrigating a total of 104 acres and that he therefore had a reserved water right to irrigate 104 acres (*id.* at 20a-22a). Alternatively, the court held that if the actions of the prior non-Indian owners were relevant, those prior owners had exercised reasonable diligence (even though they had not irrigated more than

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[3] The court of appeals also held that that the State of Washington does not have authority to regulate water in the No Name Creek water system and that petitioners' state water permit therefore was of no force and effect (Pet. App. 52a-57a). The State (but not petitioners) petitioned for a writ of certiorari to review the court of appeals' holding that the State of Washington did not have regulatory jurisdiction (No. 81-421), and the Tribes sought review of the court of appeals' holding that a non-Indian may succeed to the allottee's right to share in the reserved water right (No. 81-321). The Court denied both petitions. 454 U.S. 1092 (1981). The question of the State's regulatory authority is no longer involved in this case, and petitioners have not raised it in the instant petition.

30 acres during the intervening 23 to 27 years) in light of "prevailing economic and technological conditions" (*id.* at 23a-24a). The conditions to which the court referred were the depression during the 1930s, World War II, the primitive nature of irrigation equipment at that time, the fact that alumium pipe had not yet been perfected, and the absence of electricity in the area until 1949 (*ibid.*).

In quantifying the respective rights, the district court held that petitioners were entitled to a total of 416 acre-feet annually (4 acre-feet per acre for 104 acres) and that the allotments held in trust for Indians had an appurtenant reserved right to 666.4 acre-feet of water annually (4 acre-feet per acre for 166.6 acres). These rights totalled 1082.4 acre-feet, an amount in excess of the 1000 acre-feet that the court concluded were available in the No Name Creek basin in an average year. The court therefore reduced these allocations on a pro rata basis to 384 and 616 acre-feet, respectively. Pet. App. 24a-26a. The court believed that the Tribes were not independently entitled to a reserved water right for their fishery and that the court of appeals had contemplated only that the Tribes could reallocate to the fishery some of the irrigation water allocated to the allotments that were still in Indian ownership. Because not all of the irrigable acreage in the Indian-owned allotments was actually under irrigation, the court held that the amount of the water allocated to the Indians that was not being used for irrigation purposes (187.2 acre-feet) was available for fishery purposes at the present time. *Id.* at 26a-34a.

5. The court of appeals reversed and remanded (Pet. App. 1a-15a). It first concluded that the district court had erred in believing that only the dili-

gence of petitioner Walton was relevant in determining petitioners' entitlement to a reserved water right. Rather, the court of appeals explained that it was necessary to ascertain whether petitioners' non-Indian predecessors in interest had exercised reasonable diligence in appropriating water to irrigate 104 acres after the three former allotments passed out of Indian ownership. Pet. App. 6a-8a.

Applying this rule, the court of appeals concluded that the first non-Indian owners, the Whams, had exercised reasonable diligence in appropriating water to irrigate 30 acres (Pet. App. 10a-11a). However, it held that the Whams and the subsequent non-Indian owners had not satisfied the reasonable diligence test during the ensuing period of between 23 and 27 years in irrigating the full 104 acres for which petitioners now claim a reserved water right. The court reasoned that in order to perfect such a right, it is necessary for the owner of the land to (i) have the intent to appropriate water for the full acreage for which the right is claimed, and (ii) diligently put water to beneficial use on that acreage (*id.* at 8a-9a). In the court of appeals' view, the evidence was insufficient to support an inference that petitioners' non-Indian predecessors had the intent to appropriate water to irrigate any land in excess of the 30 acres that were brought under irrigation soon after the Whams purchased the allotments in the 1920s (*id.* at 9a-10a). The court therefore found it unnecessary to determine whether petitioners' predecessors in interest satisfied the second part of the test by actually exercising due diligence in appropriating water for the full 104 acres. In particular, the court found it unnecessary to consider whether the political and economic conditions resulting from the Great Depression and World War

II could be taken into account in determining whether water had been appropriated with reasonable diligence. *Id.* at 10a n.4.

With respect to the Omak Lake fishery, the court of appeals reversed the district court's holding that the Tribes were entitled only to reallocate to that use water that had been reserved for irrigation purposes. The court of appeals instead held that under its prior opinion in this case, the Tribes had an independent reserved right to water for the fishery in the amount of 350 acre-feet per acre annually—the amount accepted by the district court, on the basis of expert testimony, as necessary to support the fishery. Pet. App. 12a-15a.

In light of its various rulings, the court of appeals directed the district court on remand to allocate 120 acre-feet of water annually to petitioners (4 acre-feet per acre for the 30 acres petitioners' predecessors in interest had irrigated with reasonable diligence), 666.4 acre-feet for irrigation of the Indian allotments, and 350 acre-feet for the fishery (Pet. App. 15a). These rights total 1136.4 acre-feet, an amount in excess of the 1000 acre-feet available in an average year (*id.* at 13a, 15a). Because all of these reserved rights have a priority date of the establishment of the Reservation, the court ordered that the allocations be reduced on a pro rata basis in the event of a water shortage in any given year (*id.* at 15a).

ARGUMENT

The court of appeals concluded, in the particular circumstances of this case, that petitioners' non-Indian predecessors in interest did not have the requisite intent to divert water from No Name Creek to irrigate more than the 30 acres of land that had been irrigated

for approximately 25 years prior to petitioners' purchase of the three allotments in question. This fact-bound ruling does not conflict with any decision of this Court or another court of appeals. It therefore does not warrant further review.

1. The court of appeals' holding in this case is fully consistent with prior decisions in this area, including the court of appeals' own 1981 decision in this case. The court of appeals held in its 1981 decision that the non-Indian purchaser of an allotment on an Indian reservation succeeds to a right to share in the water that was reserved upon establishment of the reservation (Pet. App. 47a-52a). That prior holding was consistent with this Court's decision in *United States* v. *Powers*, 305 U.S. 527, 532-533 (1939). See also *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321, 342 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957); *United States ex rel. Ray* v. *Hibner*, 27 F.2d 909 (D. Idaho 1928). See note 7, *infra*.

In *Powers*, the Court expressly did "not consider the extent or precise nature of [the non-Indian landowners'] rights in the waters" (305 U.S. at 533), apparently because not all of the parties necessary for the quantification of the water rights were before the Court. See *United States* v. *Powers*, 94 F.2d 783, 786 (9th Cir. 1938), aff'd, 305 U.S. 527 (1939). However, in its prior opinion in the instant case, the court of appeals did elaborate upon the nature of the right the non-Indian purchaser of an allotment can acquire. The court held that although an Indian allottee does not lose (by non-use) the right to a share of the reserved water right, this characteristic does not apply to the non-Indian purchaser, who is "under no competitive disability vis-a-vis other water users" (Pet. App. 52a). The court of appeals instead adopted the rule announced in *United States ex rel.*

Ray v. *Hibner*, 27 F.2d at 912, under which the non-Indian purchaser of an allotment acquires a right, with a priority date of the establishment of the reservation, to the water actually being appropriated by the Indian allottee at the time title passes and any additional water that is appropriated by the non-Indian with reasonable diligence after passage of title (*ibid.*). Since its 1981 opinion in this case, the Ninth Circuit has adhered to the *Hibner* rule in two other cases. See *United States* v. *Adair*, 723 F.2d 1394, 1417 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984); *United States* v. *Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984). Petitioners have cited no appellate decisions rejecting the *Hibner* rule, and we are aware of none. See note 8, *infra*. There accordingly is no occasion—especially in the circumstances of this case (see pages 18-19, *infra*)—for this Court to consider the *Hibner* condition to a non-Indian's perfecting of a reserved water right on a former allotment.

2. In the end, petitioners themselves do not even object to the *Hibner* rule.[4] Indeed, they concede that "[t]he fact that non-Indian landowners, in contrast to Indians, are not presumed to be at any competi-

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[4] Nor did petitioners object to the *Hibner* rule when this case previously was before the Court. Although the Tribes and the State of Washington petitioned for writs of certiorari to review the court of appeals' 1981 decision, petitioners did not do so. See note 3, *supra*. Moreover, on that prior occasion, although petitioners did not specifically discuss in their brief in opposition the "reasonable diligence" condition that the court of appeals had directed to be considered on remand, they vigorously defended the court of appeals' ruling as being in "perfect accord" with settled precedent of more than 50 years' standing, specifically including the decision in *Hibner*. See 81-321 & 81-421 Tribe's Br. in Opp. at 7-8 & n.3, *Colville Confederated Tribes* v. *Walton*, *supra*.

tive disadvantage could possibly justify application of a general principle designed to reward diligence, and punish a lack thereof, in the development and continued beneficial application of a scarce resource." See Pet. 19.[5] They object only to the court of appeals' application of the rule to the particular circumstances of this case and to the court's resulting conclusion that the evidence does not support an inference that petitioners' predecessors in interest had the requisite intent, after the parcels passed out of Indian ownership in the early 1920s, to divert water to irrigate more than 30 acres. This fact-bound issue does not warrant review.

The requirement of an intent on the part of the prior non-Indian owners to irrigate the full 104 acres to which petitioners now claim a reserved water right

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[5] Petitioners now do object to one aspect of the court of appeals' reasoning in its 1981 opinion to which they did not object when this case previously was before the Court. See Pet. 15-18. They contend that the court of appeals should have identified the source of a non-Indian's right to share in a portion of the reserved water right as being Section 5 of the General Allotment Act, 25 U.S.C. 348, rather than the policy of that Act of assuring that the allottee realizes the full value of the allotment. However, Section 5 simply provides that a patent will be conveyed to the Indian allottee (or his heirs) at the end of the trust period, "free of all charge or incumbrance whatsoever." It does not address the distinct question of the rights of a non-Indian purchaser from the allottee after the patent has issued. In any event, we fail to see what difference it makes for present purposes what the precise rationale is for concluding that a non-Indian may share in the reserved water right when he purchases an allotment, since the court of appeals agreed with petitioners that a non-Indian may do so and petitioners ultimately do not object to the *Hibner* "reasonable diligence" prerequisite to perfecting that right.

is compelled by the principles underlying the rule announced in *Hibner* and applied by the Ninth Circuit in this case and *United States* v. *Anderson*, *supra*, and *United States* v. *Adair*, *supra*. The court in *Hibner* stated (27 F.2d at 912):

> The status of the water right after it has passed to others by the Indians seems to be somewhat different from while such right is retained by the Indians, because the principle invoked by the courts for the protection of the Indian as long as he retains title to his lands [*i.e.*, that the water right is not lost through non-use] does not prevail and apply to the white man, and the reason for so holding is that there was reserved unto the Indians the absolute right to own and use in their own way the water for their lands, while the white man, as soon as he becomes the owner of the Indian lands, is subject to those general rules of law governing the appropriation and use of the public waters of the state, and would, as grantee of the Indian allotments, be entitled to a water right for the actual acreage that was under irrigation at the time title passed from the Indians, and such increased acreage as he might with reasonable diligence place under irrigation, which would give to him, under the doctrine of relation, the same priority as owned by the Indians; otherwise, the application of any other rule would permit such grantee for an indefinite period to reclaim the balance of his land and withhold the application of the water to a beneficial use, which is against the policy recognized in the development of arid lands.

The *Hibner* rule thus is intended to conform in some measure to the principles that govern the appropria-

tion of water by a non-Indian on lands within the state generally, while at the same time giving effect to the reservation priority date where the non-Indian has adhered to those state-law appropriation principles in other respects.

The court of appeals' most recent decision in this case faithfully adheres to this rationale of the *Hibner* rule. As the court of appeals explained (Pet. App. 8a-10a), it is firmly established under the law of the State of Washington that an intent to appropriate water is a necessary prerequisite to acquiring a water right, quite aside from the matter of diligence in doing so. Thus, the Washington Supreme Court has stated that "[a]ppropriation of water consists in the *intention* accompanied by reasonable diligence to use the water for the purpose originally contemplated at the time of its diversion." *Offield* v. *Ish*, 21 Wash. 277, 280-281, 57 P. 809, 810 (1899) (emphasis added). Accord, *Longmire* v. *Smith*, 26 Wash. 439, 448-449, 67 P. 246, 249-250 (1901); *In re Waters of Doan Creek*, 125 Wash. 14, 24-25, 215 P.2d 343, 346-347 (1923); *In re Water Rights in Alpowa Creek*, 129 Wash. 9, 13-15, 224 P. 29, 31-32 (1924); *United States* v. *Big Bend Transit Co.*, 42 F. Supp. 459, 468-469 (E.D. Wash. 1941).

Against this background of state law, petitioners are in no position to object to the legal requirement that there be a showing of an intent by their predecessors in interest to irrigate the full 104 acres to which they now claim a water right with a priority date of the establishment of the Reservation. And in fact petitioners at bottom do not even appear to challenge the requirement that they establish such an intent. Their argument instead seems to be that the court of appeals reached an incorrect result on the

question of intent in the particular circumstances of this case. In their view, the court of appeals unfairly penalized them for a lack intent on the part of their predecessors in interest to do more than was reasonably possible in light of existing economic and technological conditions. See Pet. 19-20.

Petitioners' argument is seriously flawed. The court of appeals expressly did not reach the question of whether economic or technological obstacles should be taken into account in determining whether a landowner has exercised reasonable diligence in applying water to the maximum extent of his irrigable acreage where the landowner actually intended to do so as soon as circumstances permitted. The court therefore did not decide whether the water right for the entire acreage in such a case would relate back to the original priority date of the establishment of the reservation. The court simply held that in this case, because there had been no showing that the prior non-Indian owners had intended to irrigate more than 30 acres,[6] the priority date for the entire acreage petitioners brought under irrigation in 1949 does not relate back to the date of the Reservation, as does the priority date for the 30 acres first brought under irrigation many years earlier. Contrary to petitioners' contention (Pet. 19-20), there is nothing unfair about that result. It simply conforms the scope of the non-Indian's reserved water right to the intent and expectations of the original non-Indian owner when he first purchased the allotment from the Indian allottee. And it thereby conforms the limita-

[6] It is irrelevant for these purposes whether their lack of intent was due to technological or economic limitations they perceived. Such factors no doubt frequently place practical limitations on the anticipated extent of diversions.

tion on that right to the limitation on the justifiable expectations of subsequent purchasers as well. Nor is there any indication that petitioner Walton had any different expectation when he purchased the allotments in 1948.

Moreover, the price the original non-Indian purchaser paid for the allotments presumably was calculated on the basis of the water development potential of the acreage that reasonably was believed by the parties to be practicably irrigable under conditions extant at the time of the original transaction. As a general proposition, an allottee's ability to convey to a non-Indian a right to share in the reserved water right for the acreage believed to be practicably irrigable at the time the allottee sells the allotment would be consistent with the purpose of the General Allotment Act of ensuring that the allottee realizes the maximum benefit from the allotment. Pet. App. 49a-51a; *United States* v. *Anderson*, 736 F.2d at 1362. But that purpose by definition could not be served by recognition of a water right with a date-of-reservation priority for the far greater acreage that the original non-Indian purchaser did *not* intend to irrigate when he purchased the allotment, since a water right for that additional acreage presumably would not have been within the contemplation of the parties at the time of the original conveyance and would not have been taken into account in the calculation of the purchase price. As a result, recognition of a reserved water right to that greater extent would constitute a windfall for the non-Indian successors in interest who were able to exploit the unanticipated technological or economic developments. In addition, where, as here, there is insufficient water to satisfy all water rights with a date-of-reservation

priority, that windfall would be conferred at the expense of the Tribe and its members, whose reserved rights would have to be reduced on a pro rata basis in order to accommodate the expanded non-Indian reserved water right.

3. In sum, the court of appeals correctly applied settled principles that follow from this Court's decision in *Powers* and the *Hibner* rule, and the application of those principles to the circumstances of this case was fair and reasonable.[7] This case would not in any event be an appropriate vehicle for the consideration of broader questions regarding the extent to which non-Indian purchasers of allotments may share in the water rights that were reserved upon establishment of an Indian reservation. It arises out of atypical and narrow circumstances involving a small stream that lies wholly within the Colville Reservation and irrigation undertaken by a single non-Indian many years after the land passed out of Indian ownership.[8] On other reservations, non-

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[7] The United States has not reached a concluded view on whether, in an appropriate case, *Powers* should be reconsidered or its possible implications qualified. That question is not presented here, since the Court previously denied the Tribes' certiorari petition presenting the question of the transferability of the reserved water right and the Tribes have not again sought review of that holding at the present time.

[8] In a general adjudication of rights to the waters of the Big Horn River in Wyoming, a state district court held that non-Indian purchasers of allotments did not succeed to a right to share in the water right reserved by the Treaty of Fort Bridger, July 3, 1868, United States—Shoshonee Tribe—Bannack Tribe, 15 Stat. 673 *et seq.*, when the Wind River Reservation was established. *In re the General Adjudication of All Rights to Use Water in the Big Horn River System,*

Indians may have purchased land that either was included in an Indian irrigation project or was expected to be so included. In those cases, the original non-Indian purchaser might have had a more concrete expectation of sharing in the reserved water right to a specifically identifiable degree, and his entitlement to do so might have been more clearly expressed at the time of the initial purchase. The full dimension of the rights that might be claimed by non-Indians on other reservations and the extent to which any such claims are rooted in law or firm expectations remain unclear. The broader issues concerning the interplay of the water rights of Indians and non-Indians on Indian reservations generally therefore are not ripe for resolution at this time. Especially in these circumstances, the limited impact of the decision below further counsels against review by this Court.[9]

No. 101-234 (Wyo. Dist. Ct. May 24, 1985). Several of the non-Indian claimants have taken appeals from this holding to the Wyoming Supreme Court, where the appeals are still pending. Nos. 85-203 et al.

[9] Petitioners have not sought review of the court of appeals' holding that the Tribes have a reserved right to 350 acre-feet of water annually for the fishery in Omak Lake to replace the Tribes' historic fisheries on the Columbia River that were destroyed by the construction of dams. Pet. App. 12a-15a, 44a-46a. Nevertheless, we wish to bring to the Court's attention the fact that the Tribes were awarded a judgment under the Indian Claims Commission Act, ch. 959, 60 Stat. 1049 *et seq.*, in the amount of $3,257,083 for the loss of their fisheries on the Columbia River. *Confederated Tribes* v. *United States*, 43 Ind. Cl. Comm'n 505, 543-551 (1978). Our brief in opposition in 1982 addressing the fishery issue was prepared without awareness of this judgment. See 81-321 & 81-421 U.S. Br. in Opp. at 23-25, *Colville Confederated Tribes* v. *Walton*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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